FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

REPLY OF APPELLANTS

(See inside cover for Counsel)

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

Of Counsel:

BERNARD J. CAILLOUET
RICHARD P. DELANEY
LAURIC J. CUSACK
Exxon Corporation
P.O. Box 60626
New Orleans, Louisiana 70160

WILLIAM L. MARBURY
LEWIS A. NOONBERG
DAVID F. TUFARO
PIPER & MARBURY
2000 First Maryland Building
25 South Charles Street
Baltimore, Maryland 21201

ROBERT L. STERN
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Attorneys for Appellant
Exxon Corporation

Of Counsel:

JERRY MILLER
Phillips Petroleum Company
P.O. Box 31690
Amarillo, Texas 79120

J. EDWARD DAVIS
DANIEL T. DOHERTY, JR.
WEINBERG & GREEN
401 Washington Avenue
Suite 503
Towson, Maryland 21204
Attorneys for Appellant
Phillips Petroleum Company

Of Counsel:

A. M. MINOTTI
Shell Oil Company
One Shell Plaza
Houston, Texas 77002

WILLIAM SIMON
ROBERT G. ABRAMS
MARK W. PENNAK
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for Appellant
Shell Oil Company

LAWRENCE S. GREENWALD
BARRY F. ROSEN
GORDON, FEINBLATT, ROTHMAN,
HOFFBERGER & HOLLANDER
1200 Garrett Building
Baltimore, Maryland 21202
Attorneys for Appellant
Gulf Oil Corporation

TABLE OF CONTENTS

Page

ARGUMENT 2

I. PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT DISCRIMINATE AGAINST AND IMPOSE AN UNDUE BURDEN ON INTERSTATE COMMERCE 2

A. The Act, By Forcing Existing Competitors Out of the Maryland Market and Effectively Precluding New Ones From Entering, Reduces Interbrand Competition 3

B. The Act Interferes With the Operations of Major Oil Companies 5

C. Independent Dealers Dominate and Will Continue to Dominate the Sale of Petroleum Products in Maryland Whether or Not the Act Is Upheld 6

D. Direct Operation of a Retail Station Does Not Equate With Price Fixing 9

E. There Is No Evidence of Anticompetitive Use of Company Operated Stations Which Would Justify Their Elimination 10

F. The Act Has the Effect of Discriminating Against Interstate Commerce 11

II. PARAGRAPH (D) OF THE MARYLAND ACT CONFLICTS WITH THE ROBINSON-PATMAN ACT 12

A. Appellees and the Maryland Court of Appeals Misconstrue the Scope and the Protections Afforded by Section 2(b) of the Robinson-Patman Act 12

1. The Maryland court's construction of Section 2(b) is contrary to the purposes of Congress 12

TABLE OF CONTENTS—Continued

	Page
2. Appellees mistakenly rely on *Sun Oil, Standard Oil* and *Staley*	15
B. Appellees' Construction of Section 2(a) of the Robinson-Patman Act Would Leave Primary-Line Competition Among Suppliers Unprotected	18
C. Paragraph (D) Is In Conflict With the Federal Act Because It Nullifies A Federal Right and Disrupts A Statutory Balance Created by Congress	19
CONCLUSION	22

TABLE OF CITATIONS

Cases:	Page
American Oil Co. v. *Federal Trade Commission*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964)	14
Atlantic Richfield Co. v. *Zarb*, 532 F.2d 1363 (T.E.C.A. 1976)	18
Breard v. *Alexandria*, 341 U.S. 622 (1951)	11
Brimmer v. *Rebman*, 138 U.S. 78 (1891)	11
Callaway Mills Co. v. *Federal Trade Commission*, 362 F.2d 435 (5th Cir. 1966)	17
Connell Construction Co. v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975)	21
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S.Ct. 2549 (1977)	3, 5, 13
De Canas v. *Bica*, 424 U.S. 351 (1976)	19, 20
Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951)	2, 11
Enterprise Industries, Inc. v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957)	14
Federal Trade Commission v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945)	17
Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960)	13, 18
Federal Trade Commission v. *Sun Oil Co.*, 371 U.S. 505 (1963)	14, 15, 17, 18
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963)	20
Free v. *Bland*, 369 U.S. 663 (1962)	21
Gas-A-Car, Inc. v. *American Petrofina, Inc.*, 484 F.2d 1102 (10th Cir. 1973)	18
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	21
Krieger v. *Texaco Inc.*, 373 F. Supp. 108 (W.D. N.Y. 1973)	16
New York State Dept. of Social Services v. *Dublino*, 413 U.S. 405 (1973)	19
Nippert v. *City of Richmond*, 327 U.S. 416 (1946)	11
Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 341 U.S. 329 (1951)	8

TABLE OF CITATIONS—Continued

	Page
Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947)	9
Perez v. *Campbell*, 402 U.S. 637 (1971)	21
Perkins v. *Standard Oil Co.*, 395 U.S. 642 (1969)	18
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)	2
Sears, Roebuck & Co. v. *Stiffel Co.*, 376 U.S. 225 (1964)	21
Shell Oil Co. v. *Federal Energy Administration*, 400 F. Supp. 964 (S.D. Tex. 1975), *aff'd.*, 527 F.2d 1243 (T.E.C.A. 1975)	18
Standard Oil Co. v. *Federal Trade Commission*, 340 U.S. 231 (1951)	13, 16, 17
Sun Oil Co. v. *Goldstein*, Civ. No. N77-1960 (D. Md., filed Nov. 22, 1977)	5
Swift & Co. v. *Wickham*, 382 U.S. 111 (1965)	20
Wisconsin v. *Texaco Inc.*, 1961 CCH Trade Cas. ¶ 70,153 (Wisc. S.Ct. 1961)	20
Statutes:	
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* (Supp. 1975)	10
Miscellaneous:	
Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of Law & Econ. 7 (1966)	13
Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich. L. Rev. 962 (1977)	14
F. Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962)	16
Federal Trade Commission, *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373 (1967)	15
Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L.J. 935 (1957)	14, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11 and 77-47

EXXON CORPORATION AND
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY,
GULF OIL CORPORATION,
Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

Appeal from the Court of Appeals of Maryland

REPLY OF APPELLANTS

Appellants Exxon Corporation ("Exxon"), Phillips Petroleum Company ("Phillips"), Shell Oil Company ("Shell") and Gulf Oil Corporation ("Gulf") (hereafter collectively referred to as "appellants") respectfully submit this Reply.

ARGUMENT

I. PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT DISCRIMINATE AGAINST AND IMPOSE AN UNDUE BURDEN ON INTERSTATE COMMERCE

Appellees leave largely unchallenged, as they must, the conclusion that Paragraphs (B) and (C) of the Act impose a burden on interstate commerce. They seek to justify this burden by asserting that the Act protects an important local interest, *i.e.*, competition in the retail sale of petroleum products in Maryland (Brief of Appellees at 22), while the facts in the record establish the contrary.

Appellees seem to argue that because states have power to prevent destructive competition, state laws having such an objective cannot unreasonably burden or discriminate against interstate commerce. But the fact that states have general power to enact antitrust legislation, or for that matter laws designed to protect the public health (*Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951)), does not mean that all laws with such objectives are necessarily valid no matter what their effect on commerce. Where as here the practical effect is to force many interstate competitors out of the state and to exclude new entrants, and the actual and intended effect is to limit the market to local merchants, the general principles requiring a balancing of the burden on commerce against the local benefits and the availability of nondiscriminatory alternatives still apply. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[1]

[1] The Brief of *amici* Day Enterprises, *et al.*, at 41-43, suggests the contrary.

A. The Act, By Forcing Existing Competitors Out of the Maryland Market and Effectively Precluding New Ones From Entering, Reduces Interbrand Competition.

The record before this Court established that the principal effect of the Act will be to reduce significantly the opportunities for interbrand competition in Maryland by forcing the vast majority of private brand low price marketers out of the Maryland market and by preventing refiner-marketers not already in the Maryland market from ever entering that market. The uncontradicted evidence in the record established that Ashland Oil, Petroleum Marketing Corporation, Kayo Oil Company and Hudson Oil Company, which operate in Maryland exclusively with company-operated stations, would be eliminated as competitors in the Maryland market if the Act is upheld. *See* Brief of Appellants at 14. The evidence further established that these companies sell their gasoline at prices one to four cents per gallon lower than those of the major brand dealers. (A. 356, 451-52, 507, 517).

The overall effect of the Act, in eliminating existing private brand low price marketers and impeding the entry of others, will be, as the trial court found, to reduce significantly the number of competing brands and thereby reduce interbrand competition at the retail level. (J.A. 130a).[2] In addition, the elimination of the majority of the price marketer-type stations from the Maryland market will have an adverse effect on the price paid by consumers for gasoline purchased in Maryland. (A. 368-71, 427-29). Ironically, it is "intertype" competition—a form of interbrand competition between major brand stations on the one hand, and private brand stations on the other

[2] This Court recently said in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S.Ct. 2549, 2559 n.19 (1977), that "[i]nterbrand competition . . . is the primary concern of antitrust law."

hand—which appellees' expert witness said the Act was designed to promote. (A. 588-89). As conclusively demonstrated by the record in this case, and as found by the trial court, in fact the Act will have the opposite effect.

An *amicus* brief (Day Enterprises, *et al.*, at 40) asserts that the Act is designed to promote intrabrand as well as interbrand competition. But prohibiting private brand refiner-marketers from using the method of marketing which is most conducive to lower prices can hardly be said to benefit competition, intrabrand or interbrand. The statement that intrabrand competition would be frustrated if companies such as appellants Kayo and PMC were permitted to continue to do all of their selling through company-operated stations is, on its face, absurd.[3] Eliminating them from the market would merely reduce the number of low price competitors for the other brands.

Moreover, with 94 percent of Maryland's approximately 3800 stations operated by independent dealers or jobbers (A. 190-91), and with no major company (except BP) operating or contemplating the operation of more than about 10 percent of its service station outlets, the consumer clearly has the benefit of substantial intrabrand competition.[4]

---

[3] The brief of *amici* Day Enterprises, *et al.*, in the same breath in which Kayo and PMC are mentioned, also refers to BP Oil which had converted 42 of its stations to company operations between 1973 and 1974 after losing $150,000,000 in its marketing operations during the preceding years. *See* Brief of Appellants at 51 n.25. BP, however, contrary to the "statement of facts" by *amici* (at 9), was still marketing predominantly through dealer operated stations, six under the name BP and 112 under the name of William Penn. (A. 190-91).

[4] In 1975 Phillips had 13 [now reduced to six] out of 121 stations, or 10.7 percent. (A. 234). Gulf anticipated operating ten percent of its 219 stations in five years as full self-service outlets. (A. 226). As of July 1, 1974, Exxon operated 36 out of 632 of its branded stations, or less than six percent, which represents a decline from 57, or over nine percent, company operated in 1971. (A. 190, 196). Shell operated one of its 284 stations as of July 1, 1974, but no longer does so. (A. 191). Apart from BP (as noted, *supra*), the percentage of stations in Maryland operated by the other major companies ranged from zero to three percent. (A. 190-91).

B. The Act Interferes With the Operations of Major Oil Companies.

Appellants recognize that the most significant impact of Paragraphs (B) and (C) of the Act is on small independent or partially integrated refiners rather than on the major fully integrated oil companies because the latter rely and will continue to rely predominantly on independent dealers. Nevertheless, appellants reiterate that company-operated stations are an important part of their marketing operations, both in Maryland and elsewhere. As discussed in Appellants' Brief,[5] company-operated stations can be essential in entering new markets and enhancing interbrand competition. And this Court has recognized the importance to the competitive process of permitting flexibility in marketing practices under precisely those circumstances. *See Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S. Ct. 2549, 2560-61 (1977). In addition, appellants operate a limited number of their stations with company employees rather than through independent dealers in order to participate in the growing gasoline-only, self-service, and private brand markets in which gasoline generally is sold at lower prices and which are a beneficial result of the competitive process.[6]

---

[5] Brief of Appellants at 12-13.

[6] The National Congress of Petroleum Retailers in its *amicus* brief (at 8) states that nothing in the Act prohibits a producer or refiner from converting a full service station to a gasoline-only outlet. It should be noted that in 1977 the Maryland General Assembly, at the urging of dealers associations, such as the National Congress of Petroleum Retailers, enacted Chapter 870, Laws of Md. 1977, establishing a two-year moratorium on the conversion of conventional stations to gasoline-only stations. It is presently being challenged in court. *Sun Oil Company* v. *Goldstein*, Civ. No. N77-1960 (D. Md.,

C. Independent Dealers Dominate and Will Continue to Dominate the Sale of Petroleum Products in Maryland Whether or Not the Act Is Upheld.

Amici suggest that the Act is necessary to prevent 15 or 20 oil companies from controlling retail prices in Maryland.[7] But this assumes that the major integrated companies will take over and operate most, all, or a substantial proportion of the service stations in Maryland. Such control certainly cannot be achieved through the roughly 200 stations which the record shows were operated by producers and refiners (major and independent) out of approximately 3800 total stations in 1974. (A. 189-191). To require divestiture of this small number of stations which are presently company operated is clearly a case of legislative overkill. Unless one assumes the very doubtful proposition that 15 or 20 strong competitors do not provide an adequately competitive market, any basis for the alleged benefit to be derived from divestiture vanishes.[8]

---

filed Nov. 22, 1977). Professor James M. Patterson, appellees' expert in the present litigation, has filed an affidavit in the *Sun Oil* litigation in support of Sun Oil's position that the moratorium law imposes an unconstitutional burden on interstate commerce, stating that it runs counter to "consumer judgments expressed through the market," it "restrains the development of gasoline retailers who emphasize prices as their principal purchase proposition," and it "weakens both interbrand and intrabrand price competition."

[7] Brief of *amici* Day Enterprises, *et al.*, at 34.

[8] This point is significant in view of the reference by *amici* Day Enterprises, *et al.*, at 19 of their Brief, to Professor Berry (expert witness for Gulf at trial) as having conceded that "vertical integration can be a barrier to entry by requiring the new entrant to the business to enter at two levels, both marketing and refining." The reference is highly misleading and typical of the liberties concerning the record taken by *amici* in their brief, for the vertical integration of which Professor Berry spoke was an extreme and completely hypothetical case in which a pure monopolist producer merges with a sole monopolist buyer. (A. 439-40). Obviously, that has no application to the petroleum industry in Maryland or anywhere else.

[Footnote continued on page 7]

Nor does the record provide any support for the misleading inference that the major companies in general, or Exxon and Gulf in particular (Brief of *amici* Day Enterprises, *et al.*, at 9-10), will follow BP (which had acquired a weak chain of stations from Sinclair and had lost vast sums, A. 768-770) in shifting markedly to company operated stations. As indicated, Gulf intends to maintain dealers for 90 percent of its stations. Exxon operates 94 percent of its stations through dealers, and its witness testified that it would continue to rely substantially on dealers: "In the thirteen years that I've been with the company we've always operated the predominant number of our stores on a dealer operated basis and we have no plans to change that position. We feel that dealers are the backbone of our business." (A. 315).

Both the purpose and the effect of the Act are, as noted in the appellees' original answers to the bills of complaint (A. 29, 51, 77, 104, 128, 145), to promote the economic welfare of the independent major brand dealers. Not one shred of evidence was produced by the appellees, however, in support of the proposition that promoting the welfare of independent major brand dealers at the expense of competition by price marketers improves the competitive process.[9] The absence of *any* such evidence casts grave doubt upon the *bona fides* of such asserted

---

[8] [Continued]

And Professor Berry made this perfectly clear in explaining his reasons for concluding that the Maryland Act was anticompetitive. (A. 429-33).

[9] The only evidence the appellees produced related to the possible growth in competitive position of the independent private brand marketers as producers and refiners are eliminated from the market. It is not surprising to suppose that those entities not precluded from operating will benefit from elimination of their competitors. This, of course, does not mean that competition in the retail market has been improved. The record makes it clear that, in fact, such competition will be impeded.

local interest in maintaining or improving the admittedly "highly competitive" retail market in Maryland. (Brief of Appellees at 7).

Accordingly, neither the divestiture of the existing company operated stations nor the prohibition against operating other such stations serves the legitimate local purpose proclaimed by appellees which is to be balanced against the impairment of interstate commerce. The alleged potential danger to "intertype" competition perceived by appellees' expert cannot justify the elimination of the majority of all private brand marketers with the consequent reduction in interbrand competition.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 341 U.S. 329 (1951), which is relied upon by appellees and their *amici*, differs from the present case in two significant respects. First, as the Court notes, the case did not involve an absolute prohibition on business activity as does the present case. The Court simply upheld the right of the Michigan Public Service Commission to require a natural gas company to obtain a certificate of public convenience and necessity prior to selling directly to industrial consumers. *Id.* at 336. The industrial consumer Panhandle sought to serve was already being served by a public utility and a duplication of existing pipelines would have been required. Thus, the Court suggested, whether the costly duplication of lines and the loss of customers to the public utility would be in the public interest would be a matter for determination by the Commission if and when Panhandle applied for a certificate. *Id.* at 334. That is the traditional function performed by a regulatory commission in the public utility field and has no application to the present litigation. The local interest in regulating the operation of a public utility was far more compelling than Maryland's purported interest here, and the action taken to protect that interest was far less drastic than the action taken by Maryland.

A second important fact which distinguishes *Panhandle* from the present case is that the natural gas industry, with a limited number of competitors at the retail level, traditionally has been considered to be a public utility subject to extensive state regulation. *See Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 522 (1947). This is in marked contrast to the petroleum industry, where there is a large number of competitors, particularly at the retail level, and the consumer has a wide range of choices readily available. (J.A. 99a; A. 429, 432).

D. Direct Operation of a Retail Station Does Not Equate With Price Fixing.

The *amicus* briefs contend that producers and refiners operate retail stations so that they may legally fix the prices of petroleum products and thereby circumvent the antitrust laws. The record demonstrates that unbranded or privately branded products can be sold only at prices lower than major brand products, and that this cannot be accomplished through reliance upon the voluntary conduct of independent dealers. *See* Brief of Appellants at 11-12, 33-34. Efforts to force dealers to adhere to such prices would, and did, violate the antitrust laws, as the *amici* proclaim. The consequence was that only by operating stations themselves could private brands compete with other low price stations. To argue, as *amici* do, that such an effort to meet the public demand for lower prices is motivated by a desire to control the price structure in a manner contrary to antitrust policy, if not present law, is a gross distortion of what the record shows without contradiction. Moreover, the implication that any antitrust policy is impaired by permitting an entity engaged in a retail business to control the prices of the product *it* sells is to turn the antitrust laws on their head.

E. There Is No Evidence of Anticompetitive Use of Company Operated Stations Which Would Justify Their Elimination.

To justify the burdensome effects of the Act, appellees and their *amici* place heavy reliance on claims of anticompetitive practices allegedly associated with company operated stations. Notwithstanding a full trial on the issues, they are unable to point to any specific evidence in the record (apart from a generalized prediction by one witness[10] as to what might occur in the future) to support claims that alleged "windfall profits" derived by companies through production operations have been employed to engage in predatory retail pricing, that such "windfall profits" exist, or that company operated stations have been used to control the pricing practices of dealers. The most they can point to are claims of some instances of unfair allocation during the gasoline shortage of 1973, none of which involved any of the appellants. *See* Brief of Appellants at 49 n.23. But the matter of fair allocation is now subject to detailed regulation by the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* (Supp. 1975), as well as by Paragraph (F) of the Maryland Act.

In view of the record in this case, which shows that the use of company operated stations constitutes a significant pro-competitive force in the marketplace, the attempt of appellees and their *amici* to construct various extra-record theories as to how the Act protects the competitive process should not be given credence.

---

[10] The witness was Professor James M. Patterson, as to whom, see note 6, *supra*.

F. The Act Has the Effect of Discriminating Against Interstate Commerce.

Appellees and their *amici* challenge appellants' discrimination argument by stating that the Act on its face (a) does not exclude businesses solely on the basis that they engage in the production or refining of petroleum products outside Maryland, and (b) leaves undisturbed businesses not affiliated with a producer or refiner, some of which are non-Maryland entities. These statements totally ignore the realities of the Maryland marketplace.

Even though it is possible that some business may one day construct a refinery in Maryland, the undisputed fact remains that at the time the Act was passed and continuing to this date, there is no production or refining of gasoline in the State of Maryland, and the only companies prohibited by the Act from operating stations in Maryland are those engaged in out-of-state production or refining. In any event, in establishing unlawful discrimination, it would be of little significance even if some companies did engage in refining in Maryland since the overwhelming burden of the statute would still fall on the interstate operations of non-Maryland businesses. *Cf. Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951).[11] *See also Brimmer* v. *Rebman*, 138 U.S. 78 (1891), and *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), discussed in Brief of Appellants at 28-30.

Appellants submit that it is no accident that the businesses adversely affected are almost exclusively out-of-

---

[11] In contrast with *Dean Milk* and the present case, there was an obvious peculiarly local interest which this Court on balance found justified the discrimination imposed by the ordinance upheld in *Breard* v. *Alexandria*, 341 U.S. 622 (1951), a case relied upon by appellees. The local interest promoted by the ordinance banning uninvited door-to-door soliciting was the protection of residents from the nuisance of "uninvited intrusions into the privacy of their homes."

state entities. The Act was drafted so as to deprive out-of-state producers and refiners of the right to operate their stations in Maryland, and correlatively, to reserve that right to local independent dealers. The fact that there may be a few stations operated by interstate non-integrated marketers of gasoline (such as the three operated by Sears, Roebuck, A. 191) which could continue to be so operated under the Act is insignificant relative to the principal effect of the Act which is to require that producers and refiners hand over the operation of all their stations to independent dealers.

II. PARAGRAPH (D) OF THE MARYLAND ACT CONFLICTS WITH THE ROBINSON-PATMAN ACT

A. Appellees and the Maryland Court of Appeals Misconstrue the Scope and the Protections Afforded by Section 2(b) of the Robinson-Patman Act.

1. *The Maryland court's construction of Section 2 (b) is contrary to the purposes of Congress.*

Appellees assert that "federal antitrust policy" (Brief of Appellees at 41) and "the purposes and objectives" of Section 2(b) of the Robinson-Patman Act (*id.* at 44) indicate the Maryland court correctly held that Section 2(b) is available to a seller only where the seller is meeting a competing seller's equally low price offered to the same customer. The heart of appellees' position is that Paragraph (D) of the Maryland Act serves the Congressional purposes embodied in Section 2(b) by imposing "intrabrand price rigidity" so as to "stimulate interbrand price and product competition." (*Id.* at 41). This contention is erroneous.

In enacting the Robinson-Patman Act, Congress did not intend to impose intrabrand price rigidity. The express

terms of Section 2(a)[12] as well as the legislative history of the Robinson-Patman Act[13] establish that Congress recognized that price rigidity was undesirable and thus sought only to prohibit price differences which may cause substantial injury to competition. *See, e.g., FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960). Indeed, appellees concede that Congress intended that "intrabrand price restraint promoted by the Robinson-Patman Act should yield to the interbrand price freedom favored by the Sherman Act"[14] and that "to secure this interbrand preference Congress enacted Section 2(b) of the Robinson-Patman Act." (Brief of Appellees at 41). However, appellees fail to recognize that in contrast to the *increased* intrabrand price rigidity imposed by Paragraph (D), the right to meet local competition afforded by Section 2(b) promotes interbrand price competition by *lessening* intrabrand rigidity.

Appellants' practice of meeting a competing supplier's lower price by granting voluntary competitive allowances in equal amounts to all of their dealers in the same competitive trade area promotes interbrand price flexibility. Such voluntary allowances will not harm secondary-line

---

[12] Section 2(a) prohibits price discrimination only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." (15 U.S.C. § 13(a) (1970)).

[13] *See* Brief of Appellants at 82-84.

[14] *See Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 97 S.Ct. 2549, 2559 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law."); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. of Law & Econ. 7, 11 (1966) ("the legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies."); *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 249 (1951) ("Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor.").

intrabrand competition since all dealers in a trade area affected by the competing supplier's lower price receive the same competitive allowance.[15] In contrast, Paragraph (D) and the Maryland court's interpretation of Section 2(b) impose a type of statewide intrabrand price rigidity which stifles interbrand competition among suppliers.[16] This statewide intrabrand price rigidity does not protect or enhance secondary-line competition since, for example, dealers in Baltimore do not compete with dealers in other parts of Maryland such as in Salisbury. Paragraph (D) and the Maryland court's construction of Section 2(b) thus result in a decrease in competition since primary-line interbrand price flexibility is sacrificed without increasing or protecting intrabrand secondary-line competition among dealers. Such a result is directly contrary to the purposes of Congress in enacting Section 2(b). *See* Brief of Appellants at 80-94; Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L. J. 935, 942 n.32 (1957). *See generally* Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich. L. Rev. 962, 974-78 (1977).[17]

---

[15] To the extent necessary to avoid competitive injury, appellants "feather" the allowance to adjoining trade areas by granting allowances in decreasing amount as the distance from the initial trade area increases. (A. 674). This practice of feathering was suggested by this Court in *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 528 n.17 (1963), and substantially lessens the likelihood that granting voluntary allowances will result in competitive injury among dealers. *See, e.g., American Oil Co.* v. *FTC*, 325 F.2d 101, 103-05 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

[16] *See* Brief of Appellants at 81 nn.43, 44.

[17] Appellees' speculations concerning horizontal price verification (Br. of Appellees at 58-64) are inapposite to the threshold question of whether a supplier has the right under Section 2(b) to meet a competing supplier's lower price. Whether a "reasonable and prudent" supplier would find it necessary to obtain price verification from a competing supplier is not germane to the issues before this Court.

2. *Appellees mistakenly rely on* Sun Oil, Standard Oil, *and* Staley.

Appellees erroneously argue that construing Section 2(b) so as to encompass voluntary allowances granted by a supplier in response to a competing supplier's lower price would "resurrect" the "conduit theory" rejected by this Court in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963). (Brief of Appellees at 48). In *Sun Oil* this Court refused to construe Section 2(b) as permitting a supplier (Sun) to "meet" retail competition through the "conduit" of its dealers when the competition was faced solely by the dealers. The Court reasoned that to allow a supplier the Section 2(b) defense *where there was no price cut by a competing supplier* would discourage "the enterprising and resourceful retailer from seeking price reductions on his own." (371 U.S. at 523). It is apparent that a "conduit theory" has no application to situations where, as here, the supplier is facing wholesale price reductions by competitors operating at the same functional level. Indeed, if a "conduit theory" applied to such competition, it would not have been necessary for this Court specifically to reserve in *Sun Oil* the question presented here.

The purpose of Section 2(b) is to permit a seller the flexibility needed to meet its competition. *See* Brief of Appellants at 85-94. As the Federal Trade Commission has found, the reality of such competition among suppliers of petroleum products is "an undeniable fact." FTC, *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373 at 18,245 (1967). "[I]t is only by reducing its wholesale price that the supplier can respond defensively to another supplier's price cut." (*Id.*)

The basis for the Commission's finding is unassailable. As acknowledged by appellees and found by the Maryland trial court, retail petroleum marketing is "a highly com-

petitive industry." (J.A. 99a). A retail dealer which receives a price cut from its supplier can increase its volume by lowering its price so as to undersell retail dealers of competing brands. As such a dealer increases its volume, the supplier of that dealer enjoys increased sales and suppliers of competing brands lose sales as their dealers lose business.[18] As one commentator has stated, "[c]learly, a seller's need for a lower price in response to a decrease in his sales is the same whether the decrease occurs because his purchasers switch to a price cutting competitor or because they are unable to protect their share of the retail market from distributors of a rival product." Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L. J. 935, 939 (1957). *See also* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 254 (1962).

Appellees also mistakenly rely on *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951). In that case, Standard proved that the discriminatory price reductions granted to particular customers were necessary to meet the equally low prices offered to those customers by competing suppliers. (340 U.S. at 236, 238). In holding that Section 2(b) justified such discriminatory price reductions notwithstanding competitive injury among purchasers, this Court emphasized that by guaranteeing a seller the right to meet "competition at the seller's level" (340 U.S. at 251), Section 2(b) promoted competition which Congress "sought to protect." (340 U.S. at 249).

[18] Contrary to the assertion of appellees (Br. of Appellees at 51), dealers are not "captive customers", but are free to change suppliers. *See, e.g., Krieger* v. *Texaco Inc.*, 373 F. Supp. 108, 112 (W.D.N.Y. 1973). Similarly in error is appellees' assertion that appellants market through "exclusive dealing agreements." (Br. of Appellees at 57). No dealer of an appellant is in any way obligated to purchase gasoline solely from the appellant. Appellants do not object to dealers purchasing from multiple suppliers so long as such dealers do not attempt to "palm off" other brands of gasoline under the brand-name or trademark of an appellant.

Appellees assert, however, that "[t]here is no room for doubt that *Standard Oil* presumed that the existence of a 'shared customer' was a prerequisite to the invocation of Section 2(b)." (Brief of Appellees at 46). By placing such stress on this Court's references to the "shared customer" situation presented by the facts in *Standard Oil* (Brief of Appellees at 47), appellees fail to recognize that *Standard Oil* turned on the seller's need to meet competition at "the seller's level" (340 U.S. at 251)—not on whether the competition was for the same customer. Emphasis on competition at the seller's level is also the heart of this Court's decision in *Sun Oil*, where the Court reaffirmed *Standard Oil* (371 U.S. at 514), stating that as properly limited to instances where the seller is meeting competition at the seller's level, Section 2(b) "comports . . . not only with the objectives of the Robinson-Patman Act but with the general policy of preserving the benefits of competition." (371 U.S. at 522). Indeed, appellees ignore the fact that if *Standard Oil* had presumed that a "shared customer" was a requirement under Section 2(b), this Court could have relied on that ground alone in disposing of *Sun Oil* and not have expressly reserved the question now presented. *FTC* v. *Sun Oil Co.*, 371 U.S. at 529 n.19.

Appellees also mistakenly rely on *FTC* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945), and its holding that Section 2(b) is available only in individual competitive situations. By particularizing the amount and geographic scope of the competitive allowance to the geographic area affected by the competing supplier's price reduction, appellants satisfy the Section 2(b) requirement that the price reduction be tailored to the individual competitive situation presented. *See Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 442 (5th Cir. 1966). Such an individualized response is precisely what Paragraph (D) prohibits.

B. Appellees' Construction of Section 2(a) of the Robinson-Patman Act Would Leave Primary-Line Competition Among Suppliers Unprotected.

Compliance with Paragraph (D) requires a supplier of petroleum products in Maryland to grant statewide allowances and thereby engage in price discrimination that may be injurious to both primary-line and secondary-line competition.[19] Appellees contend that *as a matter of law* suppliers which comply with Paragraph (D) could never be exposed to potential liability for injury to primary-line competition with their supplier-competitors because "the price which causes injury must have been offered to a customer shared or solicited by the two sellers." (Brief of Appellees at 52). It is not surprising that "appellees can cite no authority for this contention" (*id.*), since it conflicts with the fundamental principle that Section 2(a) prohibits price differences which in fact threaten to cause injury to competition regardless of how that injury is realized or on what level. *See, e.g., Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969).[20] As this Court stated in *Sun Oil*, Section 2(a) "comprehends a 'difference in price' among even non-competing purchasers, the legality or illegality of which depends upon whether or not there is likely to be substantial injury to competition among sellers." (371 U.S. at 527 n.16, *citing FTC* v. *Anheuser-Busch, Inc.*). *See also Gas-A-Car, Inc.* v. *American Petrofina, Inc.*, 484 F.2d 1102, 1106-07 (10th Cir. 1973).[21]

---

[19] *See* Brief of Appellants at 71-79.

[20] *See* Brief of Appellants at 71-73.

[21] Appellees argue further that it would be "highly unlikely that a supplier could ever establish the fact of primary-line injury" (Br. of Appellees at 54) because the "true per gallon price" of gasoline charged to a dealer would have to include the fluctuating rent charged to a dealer. This contention is erroneous since the wholesale price charged to dealers does not include "rent". (A. 678-80). *See also Shell Oil Co.* v. *FEA*, 400 F. Supp. 964, 969-70 (S.D. Tex. 1975), *aff'd.*, 527 F.2d 1243 (T.E.C.A. 1975); *Atlantic Richfield Co.* v. *Zarb*, 532 F.2d 1363 (T.E.C.A. 1976).

C. Paragraph (D) Is In Conflict With The Federal Act Because It Nullifies A Federal Right and Disrupts A Statutory Balance Created by Congress.

Appellees assert that "appellants argue for preemption albeit they do not use that word." (Brief of Appellees at 55). This contention is based on appellants' statement that Paragraph (D) "must be struck down on the independent ground that it nullifies the accomplishment and execution of the full purposes of Congress in enacting Sections 2(a) and 2(b) of the Robinson-Patman Act." (Brief of Appellants at 79-80; Brief of Appellees at 55). Appellees misapprehend both the nature of the conflict between Paragraph (D) and the Robinson-Patman Act and appellants' argument.

Contrary to appellees' assertion, appellants do not argue that in enacting the Robinson-Patman Act Congress intended to preempt all state legislation on the subject of price discrimination or that price discrimination is a field requiring exclusive federal regulation. Rather, it is appellants' contention that Paragraph (D) must be struck down under the Supremacy Clause because it is in direct, actual, irreconcilable conflict wih the Robinson-Patman Act.[22]

---

[22] As explained by this Court in *De Canas* v. *Bica*, 424 U.S. 351, 359 n.7 (1976), a case of preemption is presented where Congress has decided to exercise its power to "occupy the field" and thereby "exclude *any* state regulation, even if harmonious". (Emphasis the Court's). "[E]ven absent such a manifestation of Congressional intent to 'occupy the field'", a state statute is void under the Supremacy Clause if it "conflicts in any manner with any federal laws or treaties." (*Id.* at 357 n.5).

Appellees' misapprehension of the question presented apparently is shared by the *amici* Day Enterprises, *et al.*, which, like appellees, rely on *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973), and other preemption cases in arguing that preemption is not appropriate absent a "clear manifestation" of Congressional intent. (Br. of *amici* Day Enterprises, *et al.*, at 24; Br. of Appellees at 56). Appellees and *amici* fail to realize that these cases are inapposite since the question presented (Br. of Appellants at 5) is

Appellees fail to recognize that a conflict between state and federal statutes may be found in two ways—both of which exist here. First, this Court has held that a conflict "is inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963). Paragraph (D) conflicts with federal law in this manner since compliance with Paragraph (D) exposes a supplier to primary-line and secondary-line liability under Section 2(a) of the Robinson-Patman Act.[23]

Second, even if compliance with both statutes is possible, a state statute is in conflict with a federal statute

whether Paragraph (D) is in *conflict* with the Robinson-Patman Act—not whether Congress intended to preempt all state legislation in the area of price discrimination. *See De Canas* v. *Bica*, 424 U.S. at 363.

[23] Relying on the Wisconsin Supreme Court's decision in *Wisconsin* v. *Texaco Inc.*, 1961 CCH Trade Cas. ¶ 70,153 (Wisc. S.Ct. 1961), *amici* Day Enterprises, *et al.*, argue at length that the Robinson-Patman issue "is wholly unripe for decision." (Br. of *amici* Day Enterprises, *et al.*, at 26). This argument is not shared by appellees and is contradicted by the substantial factual record developed below.

Amici's reliance on *Wisconsin* v. *Texaco Inc.* is misplaced. In that case Wisconsin brought suit alleging that Texaco had violated state antidiscrimination laws in granting "Dealers Aid Allowances". (1961 CCH Trade Cas. ¶ 70,153 at 78,588). Texaco *demurred* to the complaint on the ground, *inter alia*, that the Wisconsin statute was in conflict with the Robinson-Patman Act. The Wisconsin Supreme Court affirmed the trial court's denial of the demurrer, ruling that the conflict between the state statute and the federal statute could not be decided on the pleadings alone. In contrast, in this case the trial court had before it numerous undisputed affidavits and exhibits setting forth all relevant facts concerning the operation of Paragraph (D) and appellants' practice of granting voluntary competitive allowances. Further, unlike the state statute involved in *Wisconsin* v. *Texaco Inc.*, Paragraph (D) has been definitively construed by the highest state court. Accordingly, the question of conflict presented here is but a problem of "comparing two statutes" *Swift & Co.* v. *Wickham*, 382 U.S. 111, 120 (1965), on the basis of the facts supplied in the record.

and must be struck down where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the federal statute. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977). Paragraph (D) obstructs the purposes of Congress by nullifying a seller's right of self-defense to meet local competition. *See* Brief of Appellants at 88-94. This denial of a federal right and the consequent interference with a federal policy is in itself sufficient to invalidate Paragraph (D). *See, e.g., Perez* v. *Campbell*, 402 U.S. 637, 649-52 (1971); *Free* v. *Bland*, 369 U.S. 663, 669-70 (1962).

Paragraph (D) also interferes with Congress' purposes and objectives by disrupting the delicate balance struck by Congress between the Robinson-Patman Act and the Sherman Act. In enacting the Robinson-Patman Act, Congress intended to promote the Sherman Act objective of price competition by prohibiting only those price differences which may substantially lessen competition and by providing sellers with the absolute right under Section 2(b) to meet a local competitor's equally low price. *See* Brief of Appellants at 80-88. Paragraph (D) interferes with this statutory balance and thus conflicts with the Robinson-Patman Act by prohibiting price differences without regard to competitive effect and by eliminating the Section 2(b) defense. (*Id.*). Paragraph (D) must therefore be struck down under the Supremacy Clause. *See Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635-37 (1975); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 230-33 (1964).

CONCLUSION

For the foregoing reasons and for the reasons stated in appellants' Brief, Paragraphs (B), (C) and (D) of the Maryland Act should be declared invalid.

Respectfully submitted,

Of Counsel:

BERNARD J. CAILLOUET
RICHARD P. DELANEY
LAURIC J. CUSACK
Exxon Corporation
P.O. Box 60626
New Orleans, Louisiana 70160

WILLIAM L. MARBURY
LEWIS A. NOONBERG
DAVID F. TUFARO
PIPER & MARBURY
2000 First Maryland Building
25 South Charles Street
Baltimore, Maryland 21201

ROBERT L. STERN
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Attorneys for Appellant
Exxon Corporation

Of Counsel:

JERRY MILLER
Phillips Petroleum Company
P.O. Box 31690
Amarillo, Texas 79120

J. EDWARD DAVIS
DANIEL T. DOHERTY, JR.
WEINBERG & GREEN
401 Washington Avenue
Suite 503
Towson, Maryland 21204
Attorneys for Appellant
Phillips Petroleum Company

Of Counsel:

A. M. [illegible]IOTTI
Shell Oil Company
One Shell Plaza
Houston, Texas 77002

WILLIAM SIMON
ROBERT G. ABRAMS
MARK W. PENNAK
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Attorneys for Appellant
Shell Oil Company

LAWRENCE S. GREENWALD
BARRY F. ROSEN
GORDON, FEINBLATT, ROTHMAN,
HOFFBERGER & HOLLANDER
1200 Garrett Building
Baltimore, Maryland 21202
Attorneys for Appellant
Gulf Oil Corporation

February 14, 1978